149 U.S. 248 - 251

RECORD, CASE No. 14,984.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1510~~. 1024

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, APPELLANT,

vs.

WILLIAM R. McKEEN.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED FEBRUARY 29, 1892.

SUPREME COURT OF THE UNITED STATES.

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THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, APPELLANT,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 5, 1892.

ited States Circuit Court of Appeals for the Seventh Circuit.

WEDNESDAY, *January* 13, 1892.

CINCINNATI, HAMILTON AND DAYTON R. R. CO.
vs.
WILLIAM R. MCKEEN.

This cause now coming on to be heard before Walter Q. Gresham, circuit judge, and Henry M. Blodgett and James G. Jenkins, district judges, neither the Chief Justice nor any associate justice of the Supreme Court of the United States being in attendance or able to attend, and it appearing that the circuit judge is unwilling to sit upon the final hearing and determination of this appeal, and that Judge Jenkins is disqualified from sitting because of having heard and determined this cause in the circuit court; and it further appearing to the court that this appeal involves questions of law of grave importance (some of which arise under the laws of a State in another circuit, involving the powers of railroad corporations under the laws of such State), which should be certified to the Supreme Court of the United States—

It is therefore now ordered by the court, upon its own motion, but with the consent of the parties hereto, that the following questions and propositions of law be, and the same are hereby, certified to the Supreme Court of the United States as questions or propositions of law concerning which this court desires the instructions of that court for their proper decision, to wit:

I.

Whether the contract of June 1st, 1887, between the appellee and Henry S. Ives, trustee, set out in the bill and answer herein, if made by Ives as trustee for appellant, was *ultra vires* the appellant.

II.

Whether the transfer by appellee to Ives, trustee, of all the stock mentioned in said contract and the payment to the appellee of all the cash payments called for by said contract and the execution and delivery to the appellee by Ives, trustee, of the note for $669,150.00 and the securing of said note by the pledge of said stock, as in said contract provided, constituted such an execution of said contract of June 1st, 1887, as to preclude the appellant from maintaining a bill in equity to cancel said contract and note and recover said cash payments.

III.

Whether a railroad corporation can by its subsequent acts, declarations, and claims estop itself from pleading in its own behalf *ultra vires* as to a contract which has been wholly or partially executed and under which property has passed and money has been paid.

IV.

Whether earnings and ordinary assets of a railroad corpor constitute trust funds in such a sense that they can be followed recovered from a party to whom such earnings and ordinary fu have been paid by the corporation and received by the other pa under an *ultra vires* contract.

V.

After the cash payments and notes provided for in the said contract of June 1st, 1887, between appellee and Henry S. Ives, trustee, had been made and given, to wit, on June 4th, 1887, five out of the seven directors of the Terre Haute and Indianapolis Railroad Company resigned and five persons who were then directors and officers of appellant were elected to fill the vacancies, and thereupon Henry S. Ives, then a vice-president of appellant, was elected president of the Terre Haute & Indianapolis Railroad Company; C. C. Waite, also a vice-president and general manager of appellant, was elected vice-president and general manager of said Terre Haute and Indianapolis Railroad Company, and F. H. Short, assistant secretary and assistant treasurer of appellant, was elected secretary and treasurer of said Terre Haute and Indianapolis Railroad Company; Henry S. Ives and Company were appointed fiscal agents of said Terre Haute and Indianapolis Railroad Company. Appellee then was and never ceased to be a director of said Terre Haute and Indianapolis Railroad Company, and was present at the meeting when all the elections and appointments hereinbefore specified were held and made and either voted for them or made no objections to them. The Terre Haute and Indianapolis Railroad Company, together with all its property and assets, immediately on said 4th day of June, 1887, passed into the possession and under the control and management of the persons hereinbefore named as its officers and directors, and between that date and August 9, 1887, the treasury of said Terre Haute and Indianapolis Railroad Company was depleted to the extent of more than $1,500,000.00, and by reason of this depletion the stock of the Terre Haute and Indianapolis Railroad Company, including the stock embraced in the said contract of June 1st, 1887, was greatly depreciated in value. Almost all the items going to make up said depletion passed through the hands of said Short, as treasurer of said Terre Haute and Indianapolis Railroad Company, to Henry S. Ives & Company, fiscal agents, and became lost by the failure of that firm in August, 1887, the appellant receiving no part of said money nor any benefit therefrom.

This court certifies to the Supreme Court of the United States:

First. Whether the foregoing facts preclude appellant from maintain-g this bill to rescind said contract of June 1st, 1887, without first putting the appellee *in statu quo*.

Second. Whether if, with respect to said depletion and consequent depreciation in value of Terre Haute and Indianapolis railroad stock, the appellee was negligent or otherwise culpable as a director

Terre Haute and Indianapolis Railroad Company the rule
l be different.

ird. Whether appellant's right of rescis-ion with respect to the
e Haute and Logansport railroad stock (so far as such right is
med because of the contract of June 1st, 1887, being *ultra vires*)
affected by the depletion aforesaid of the said Terre Haute and Indianapolis Railroad Company's treasury.

VI.

The negotiations preceding the making of the said contract of June 1st, 1887, were all carried on by Henry S. Ives in person, assisted by persons all of whom were known to appellee to be officers of appellant, The Cincinnati, Hamilton and Dayton Railroad Company, but the name of appellant was not used in the negotiations. The contract of June 1st, 1887, and the note of June 4th, 1887, were signed by Henry S. Ives, trustee, without stating who was his *cestui que trust.*, and appellee made no inquiries as to who was the *cestui que trust.* During the negotiations said Ives told appellee that he would go back east, consult his friends, and let appellee know what could be done about the matter. On the day the contract was signed, but before it was delivered, the appellee received a telegram from J. N. McCullough, vice-president of Pennsylvania Company, saying: "We see it stated in yesterday's Cincinnati papers and quoted in to-day's New York papers that the C., H. & D. Co. and their associates have purchased your line of road between Indianapolis and Terre Haute. Is there any foundation for this report? Please answer quick." To this telegram the appellee answered to the effect that the trade had not yet been consummated. The first payment of $250,000.00 was made by a draft for that sum drawn by Henry S. Ives, trustee, to the order of W. R. McKeen, on F. H. Short, assistant treasurer C., H. & D. R. R. Co., at Cincinnati. The subsequent payments were made by drafts drawn on the printed blanks of the appellant, to the order of H. S. Ives, trustee, signed by F. H. Short, assistant treasurer of the C., H. & D. R. R., and countersigned by the auditor of said C., H. & D. Railroad Company, and by drafts drawn by Cincinnati banks on New York banks, payable to the order of the Cincinnati, Hamilton & Dayton Railroad Company. All these drafts were endorsed by said company to "Henry S. Ives, trustee," and were by Ives, trustee, endorsed to appellee under the style of "Henry S. Ives, trustee," when they were delivered to appellee.

Under these facts was McKeen, the appellee, legally chargeable with notice that said Ives was acting as agent for appellant, and that appellant was the real purchaser of the stock?

And it is now ordered by this court that the foregoing questions and propositions of law be, and the same are hereby, certified to the Supreme Court of the United States, and the clerk of this court is hereby directed to transmit to the clerk of the Supreme Court of the United States, in connection with this certificate, twenty (20) copies of the printed record of this cause.

United States Circuit Court of Appeals for the Seventh Cir

I, Oliver T. Morton, clerk of the United States circuit co appeals, do hereby certify that the foregoing seven (7) pages, bered from one (1) to seven (7), inclusive, contain a true copy o order entered in the case of Cincinnati, Hamilton & Dayton R. Co. *vs.* William R. McKeen, No. 9, October term, 1891, as the sam remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 19th day of February, A. D. 1892.

OLIVER T. MORTON,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: Case No. 14,984. Court of appeals, seventh circuit. Term No., 1510. The Cincinnati, Hamilton and Dayton Railroad Company, appellant, *vs.* William R. McKeen. Filed February 29, 1892.

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Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

Case No. 14984. *Term No.*, 1024.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, APPELLANT,

vs.

WILLIAM R. McKEEN, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION.

The appellant moves—

1. That the record sent up by the circuit court of appeals be received, and that the whole record and cause may be ordered to be retained in this Court for its consideration.

2. That the case be advanced.

On June 1, 1887, the appellee, W. R. McKeen, entered into a written contract with one Henry S. Ives, trustee, for the

sale by the former to the latter of 11,160 shares of the capital stock of the Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute and Logansport Railroad Company in consideration of $1,558,650, of which $889,500 was paid in cash to McKeen at the time. For the balance ($669,150) he received the six months' note of Ives, trustee.

In making the purchase Ives was in fact acting as the agent of the appellant, The Cincinnati, Ham ilton and Dayton Railroad Company, of which he was vice-president, and the cash payment of $889,500 was made by it, and with its funds.

Ives was subsequently deposed as an officer of the Cincinnati, Hamilton and Dayton Railroad Company for frauds committed by him upon it. Its board of directors was reorganized, and this bill was filed by it to rescind the contract with McKeen, to recover the cash payment of $889,500 made thereunder, and to cancel the outstanding note, upon the grounds (1) that the contract was *ultra vires* the company, and (2) that the defendant had been guilty of fraudulent collusion with Ives.

The defendant, denying all allegations of fraud, insists—

(1.) That the contract is not *ultra vires* the Cincinnati, Hamilton and Dayton Railroad Company.

(2.) That the defendant had no notice or knowledge that the Cincinnati, Hamilton and Dayton Railroad Company was the real purchaser, or that Ives was acting as its trustee in making the purchase.

(3.) That the contract was subsequently ratified, approved,

and confirmed by the Cincinnati, Hamilton and Dayton Railroad Company.

(4.) That after the making of the contract and prior to the bringing of this suit the control of the Terre Haute and Indianapolis Railroad Company was turned over to Ives and his associates, who were also officers of the Cincinnati Hamilton and Dayton Railroad Company; that H. S. Ives & Co. had been made fiscal agents of the Terre Haute and Indianapolis Railroad Company, whose treasury had been depleted to the extent of more than $1,500,000 by their failure, and that the Cincinnati, Hamilton and Dayton Railroad Company cannot rescind in view of the consequent depreciation in the value of the stock of the Terre Haute and Indianapolis Railroad Company, without putting the defendant *in statu quo*.

(5.) That the contract had been so far executed as to defeat the bill in any event.

The case was heard in the circuit court by James G. Jenkins, district judge for the eastern district of Wisconsin, who was assigned to try the case, because neither the circuit judge, Gresham, nor the district judge, Woods, would consent to hear it, on account of their relations to the parties and the cause. Judge Jenkins held that McKeen had notice that the Cincinnati, Hamilton and Dayton Railroad Company was the real purchaser, for whom Ives was acting as trustee, but without passing upon the question whether the contract was *ultra vires* the Cincinnati, Hamilton and Dayton Railroad Company he dismissed the bill upon the third, fourth, and fifth of the foregoing grounds of defense.

(See his opinion, Printed Record, p. 67.)

The decree was made July 23, 1891. An appeal was duly taken to the circuit court of appeals for the seventh circuit. When the appeal came on to be heard in that court the circuit judge was unwilling to sit, on account of his relations to the parties and the cause. Another member of the court, Judge Jenkins, was disqualified on account of having heard and determined the cause in the circuit court, and the court of its own motion directed that the cause be certified to this Court, and that twenty copies of the printed record be sent to the clerk of this Court.

The only means of getting the case before this Court in the first instance was by certifying to it "questions or propositions of law" under section 6 of the judiciary act of March 3, 1891. Under rule 37 of this Court it is required that "the certificate shall contain a proper statement of the facts on which such question or propo-ition of law arises." It was impossible at bar to comply with this rule, because the facts are in dispute, and there was not a quorum of judges in the circuit court of appeals competent to determine the dispute and to settle the ultimate facts necessary to present the questions of law. The questions certified to this Court necessarily, therefore, refer to the record, and contain statements of evidence rather than of ultimate facts, and present questions in the alternative, in all of these respects not conforming strictly to the rules of this Court; but it was impossible to avoid the irregularity, and under the circumstances there can be no hearing of the case, and no relief is obtainable unless this Court require the whole record and cause to be retained for its consideration.

The difficulty has not been relieved, but increased, since the former action of the circuit court of appeals, because the

circuit judge (Woods) meantime appointed is also disqualified from sitting in the case.

We are aware that this Court is reluctant to order the whole cause sent up for its consideration in cases where propositions of law are certified to it by the circuit court of appeals under section 6 of the act of March 3, 1891, and that it has directed that only questions of gravity and importance should be certified. The questions of law arising in the case would justify their certification to this Court under the most stringent application of the rule, even if there were a quorum of judges in the circuit court of appeals competent to pass upon them in the first instance, and the peculiar and extraordinary circumstances of this case growing out of the relations of both of the circuit judges of the seventh circuit to the cause leave no course open to the parties but to apply for the additional relief sought by this motion. The embarrassment is increased by the absence from the country of the justice of this Court assigned to the seventh circuit, and the resignation of the senior district judge of the circuit. The cause was first called for hearing in the circuit court of appeals at the October term, 1891, when Mr. Justice Harlan was present; but he announced that his engagements in this Court would prevent him from sitting in the case in the circuit court of appeals.

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With the circuit justice absent from the country and both circuit judges disqualified from sitting, it is at least doubtful whether a circuit court of appeals can be organized in the seventh circuit for the hearing of this cause under the judiciary act of March 3, 1891, which seems to require the presence of a circuit justice or a circuit judge, and does not contemplate a court composed of district judges only.